

NTSB Order No.
EM-178

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of November, 1994

J. W. KIME, Commandant, United States Coast Guard,

v.

ROGER LEVIN, Appellant

Docket ME-158

ORDER

The Commandant has moved to dismiss the appeal filed in this proceeding on the ground that the Board lacks jurisdiction to review the Coast Guard decision it challenges. For the reasons discussed below, the motion to dismiss will be granted.

The Board's authority over Coast Guard merchant mariner actions is limited to the review of decisions of the Commandant on appeals from administrative law judge decisions that deny, revoke, or suspend a seaman's license or document. See 49 U.S.C. # 1133 (1994). This appeal does not involve such a decision. It involves, rather, a decision by the Commandant that appellant, in addition to meeting other requirements set forth in 46 C.F.R. # 16.370(d), had to prove that he was drug-free before he could return to work aboard a vessel because he had tested positive for cocaine during a random drug screening conducted by his employer, the New York City Department of Transportation (NYC-DOT).

Appellant takes the position that he should not have had to comply with the regulation because the Coast Guard, after an investigation that disclosed some procedural flaws in the paperwork on appellant's urine specimen, determined not to use the test results as the basis for a proceeding to suspend or revoke his license. That determination, the appellant in effect maintains, renders the drug test invalid and defeats any conclusion that he failed the test, a condition precedent for imposing re-employment obligations under the cited regulation. Appellant asserts that the Commandant's decision has cost him back pay and seniority rights at the NYC-DOT.

Although conceding that the statutory predicate for Board review is lacking, in that there is no underlying decision by an administrative law judge suspending or revoking his license, appellant argues in his opposition to the motion to dismiss that the decision to require him to comply with 46 C.F.R. # 16.370(d) was tantamount to a suspension the Board should review because it took him almost a year to fulfil the regulation's requirements. While we would agree that the Commandant's decision should be, and presumably is, subject to review, we do not agree that we are the forum empowered to provide it.⁽¹⁾

The boundaries of our jurisdiction respecting the Coast Guard have been narrowly drawn to encompass only one category of Commandant decisions that have an impact on a seaman's ability to exercise the rights secured by a license or document; namely, those decisions that arise in the context of a controversy first resolved by an administrative law judge. We think the grant of authority to review those specific decisions precludes a conclusion that we possess some broader, implied authority to determine the validity of any other kind of decision the Commandant may issue so long as its effect on a seaman is similar to those over which we have an express entitlement to review.

ACCORDINGLY, IT IS ORDERED THAT:

1. The motion to dismiss is granted, and
2. The appellant's appeal is dismissed.

HALL, Chairman, LAUBER, HAMMERSCHMIDT, and VOGT, Members of the Board, concurred in the above order.

(1) Judicial review of agency action is generally available, see 5 U.S.C. # 702.